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Tighten the Law on Covert Operations

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It's clear by now to most Americans that the White House scandal involved some sort of violation of Congressional restrictions on covert operations. Yet many people seem to forget that these restrictions were part of a careful deal worked out between Congress and the executive branch little more than a decade ago to protect our constitutional system while permitting covert operations. Apparently, this tacit deal was not enough, and it ought to be made more binding now.

The intelligence scandals of the 1970's revealed that the Central Intelligence Agency, operating as the secret arm of the White House, had regularly acted in ways that threatened constitutional rights and procedures at home and were inconsistent with American principles abroad. The public and Congress alike were shocked by reports of C.I.A. assassination efforts and of spying on Americans — revelations that made a powerful case for simply prohibiting covert operations.

Congress was not willing to go that far, but it did insist on a set of rules designed to limit the harm caused by covert activities. Some of these principles were embodied in law, others were tacitly agreed upon but clearly understood by key participants from the executive branch and Congress. All have been violated in both the Iran arms sale and in aid to the contras — suggesting now an urgent need to further clarify the rules.

The first principle was that any covert operation should be consistent with a publicly announced and Congressionally sanctioned policy. The intent, clearly, was to insure that any actions taken in secret would have the support of Congress and the public. But the rule made sense in other ways, for — as most intelligence professionals will agree — a covert operation can provide support for a policy pursued by other means, but it cannot by itself accomplish great purposes. Besides, a covert operation that contradicts American public policy will almost certainly leak sooner or later, thus putting the operation in jeopardy.

The second principle required full debate, within the executive branch, of any planned covert operation. This would have prevented operations like the Bay of Pigs fiasco, which surely would not have happened if those in the bureaucracy who would have known it was doomed to failure were let in on the secret in advance. Requiring career officials in the State Department, the Defense Department, the C.I.A. and responsible cabinet officers to review plans for covert operations would weed out such ill-fated schemes. Close scrutiny by the Attorney General would insure that operations were lawful.

The third principle was to abandon the practice known as "Presidential denial" — an elaborate means by which the President could evade responsibility for covert activities. This practice was revealed when the Senate Intelligence Committee tried to determine if any President had ordered an assassination: it came up against a set of procedures that were designed precisely to obfuscate the degree of the President's involvement in any intelligence operation and thus allow him to claim plausibly that he had not approved of it. This, Congress said, was impermissible. The President must be willing to take responsibility by explicitly approving each operation in writing.

The fourth principle required that Congress, through its intelligence committees, be notified in advance of any planned operation. The committees were not given a veto. But it was hoped that the members would reach a consensus judgment of the proposed operation that would then be conveyed to the C.I.A. and the President. This committee debate, like the process of consultation within the executive branch, was to serve as a partial substitute for public debate. Besides, if Congress believed that the operation was a serious mistake and could not persuade the President to call it off, it could legislate restrictions or an outright prohibition.

The fifth principle simply required the executive branch to obey Congress's restrictions on intelligence operations with the same fidelity to the rule of law and deference to Congressional intent that it showed to Congress's restrictions on other Government activities.

The Reagan Administration's actions in selling arms to Iran and facilitating aid to the contras violated each of these principles systematically and deliberately.

The sale violated several of the Administration's declared policies — its opposition to any nation's arms deliveries to Teheran and its refusal either to negotiate with hostage-takers or to deal with nations that support terrorists. Such covert operations that violate public policy make a mockery of the democratic process and strike at the heart of the First Amendment.

The arms sale also clearly violated the principle of full debate within the executive branch. The State Department and the Joint Chiefs of Staff were kept in the dark. The Attorney General gave only the most routine and perfunctory of oral approvals.

Apparently at the insistence of C.I.A. professionals, the President did give formal written approval to the arms sales in 1986, but his acquiescence in 1985 and his approval of various forms of assistance to the contras were classic examples of schemes designed to permit Presidential denial. They have forced yet another search for what the President knew and when he knew it.

The failure to notify the Congressional committees of both planned operations had the intended effect of preventing scrutiny by representatives sensitive to American interests and not committed to the operations. Certainly, it is hard to believe that the sales would have gone forward if both the committees and the Secretary of State had been notified — and surely this is why they were not told.

The sales to Teheran also violated the law. In deciding to proceed without notifying Congress, the White House clearly violated the intent of the Intelligence Oversight Act and Director of Central Intelligence William J. Casey's explicit guarantees to the oversight committees that he would inform them of any covert operation. The evidence also suggests that the Boland Amendment, prohibiting aid to the contras, was evaded and avoided in a variety of ways.

Career officials of the C.I.A. recognize that the violation of these principles will jeopardize Congressional support for the agency. But far more than that is at stake. The White House scandal demonstrates once again that unrestrained covert activities threaten both constitutional government at home and the proper pursuit of American interests abroad.

If Congress is not ready to abolish such activities, it must enact the principles discussed here into law in clear and unambiguous language and without the loopholes that permitted Mr. Reagan to evade them. Congress should specify criminal penalties for violations of these rules and do everything it can to remind the intelligence committees that future Presidents will look for loopholes.

The sad truth is Presidents and their advisers are inevitably drawn to secret Presidential policies. The only question is whether two sets of scandals are enough or whether we will need more before Congress does its duty. □

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